



Docket No.: 237081US26



ATTORNEYS AT LAW

COMMISSIONER FOR PATENTS  
ALEXANDRIA, VIRGINIA 22313

RE: Application Serial No.: 10/807,121

Applicants: Michel FONTAINE

Filing Date: March 24, 2004

For: PACKAGING AND APPLICATOR DEVICE FOR A  
COSMETIC PRODUCT AND/OR A BEAUTY CARE  
PRODUCT INCORPORATING A MEANS OF  
HEATING

Group Art Unit: 3751

Examiner: Le, H.

SIR:

Attached hereto for filing are the following papers:

#### ELECTION OF SPECIES

Our check in the amount of \$0.00 is attached covering any required fees. In the event any variance exists between the amount enclosed and the Patent Office charges for filing the above-noted documents, including any fees required under 37 C.F.R. 1.136 for any necessary Extension of Time to make the filing of the attached documents timely, please charge or credit the difference to our Deposit Account No. 15-0030. Further, if these papers are not considered timely filed, then a petition is hereby made under 37 C.F.R. 1.136 for the necessary extension of time. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

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DOCKET NO: 237081US26



IN THE UNITED STATES PATENT & TRADEMARK OFFICE

IN RE APPLICATION OF :  
MICHEL FONTAINE : EXAMINER: LE, H.  
SERIAL NO: 10/807,121 :  
FILED: MARCH 24, 2004 : GROUP ART UNIT: 3751  
FOR: PACKAGING AND APPLICATOR :  
DEVICE FOR A COSMETIC PRODUCT  
AND/OR A BEAUTY CARE PRODUCT  
INCORPORATING A MEANS OF  
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**ELECTION OF SPECIES**

COMMISSIONER FOR PATENTS  
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SIR:

In response to the Office Action dated January 31, 2006, Species I, examples of which are shown in Figure 4, is elected with traverse. Accordingly, claims 1-24 and 26-55 are identified as reading on the elected species.

The outstanding requirement is traversed for several reasons.

First, the outstanding Office Action merely includes the conclusory statement that "[t]his application contains claims directed to the following patentably distinct species" without stating any basis whatsoever in support of such a finding. This is in violation of MPEP § 816, which states:

The particular reasons relied on by the examiner for holding the inventions as claimed are either independent or distinct should be concisely stated. A mere statement of conclusion is inadequate. The reasons upon which the conclusion is based should be given.

In the absence of any annunciated basis, it is submitted that the PTO clearly has not carried forward its burden of proof to establish distinctness.

Further, MPEP § 806.04(f) requires:

Claims to be restricted to different species must be mutually exclusive.

The outstanding Official Action fails to address in any way whether the pending claims recite mutually exclusive characteristics and this failure provides a basis for traversing the election of species requirement.

Finally, MPEP § 803 states:

If the search and examination of an entire application can be made without serious burden, the Examiner must examine it on the merits, even though it includes claims to distinct or independent inventions.

The claims of the present invention would appear to be part of an overlapping search area. Accordingly, the outstanding requirement is traversed on the grounds that a search and examination of the entire application would not place a *serious* burden on the Examiner.

Therefore, it is requested that the requirement to elect a single species be withdrawn, and that a full examination on the merits of claims 1-55 be conducted.

Respectfully submitted,

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